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IN THE

Supreme Court of the United States

E. K. McDANIEL, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney
General of the State of Nevada,
Petitioners,

v.

EDWARD F. WILLS, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS A PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 A "SECOND OR SUCCESSIVE APPLICATION" PURSUANT TO 28 U.S.C. § 2244(b)(3)(A) REQUIRING THE APPLICANT TO MOVE IN THE APPROPRIATE COURT OF APPEALS FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER THE APPLICATION IN THE CIRCUMSTANCE WHERE THE APPLICANT HAS HAD A PRIOR PETITION PURSUANT TO 28 U.S.C. § 2254 FULLY ADJUDICATED ON THE MERITS?

2. DID THE COURT OF APPEALS PROPERLY GRANT A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c)?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, above-named, file this petition for writ of certiorari and seek an order vacating the August 12, 1999, Order of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals"), in which the Court of Appeals: (1) reversed the decision of the district court that it lacked

jurisdiction; and (2) ruled that Respondent Edward F. Wills ("Wills") did not need to seek permission from that Court in order to file a successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, notwithstanding the fact that Wills had a previous petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 fully adjudicated on the merits.

I. OPINIONS AND JUDGMENTS BELOW

The Opinion of the Court of Appeals at issue was filed on August 12, 1999. Appendix A. The Order of the District Court was filed on January 5, 1999. Appendix B. A previous decision of the Court of Appeals was filed on September 23, 1994 (*Edward F. Wills v. George Deeds*, No. 91-16902). Appendix C. The first decision by the Court of Appeals relating to a federal habeas corpus petition challenging the same conviction was filed on March 7, 1991 (*Edward Francis Wills v. Harol L. Whitley*, No. 90-15159). Appendix D.

II. JURISDICTIONAL STATEMENT

The federal district court reviewed the matter, filed as a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody. Appendix B. The district court, recognizing the existence of two prior federal

habeas corpus petitions, including one fully adjudicated on the merits, concluded, pursuant to 28 U.S.C. § 2244(b)(3)(A), that it lacked jurisdiction to proceed further. Appendices B, C and D. Without briefing or oral argument, the Court of Appeals summarily reversed the district court on August 12, 1999. Appendix A. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the Court of Appeals. 28 U.S.C. § 2101(c).[1] *See also* Sup. Ct. R. 20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(b)(3)(A): "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

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[1] Because this petition seeks review of an order from the Court of Appeals reversing the district court, it is not subject to the jurisdictional limitation found at 28 U.S.C. § 2244(b)(3)(E). This is in accord with this Court's finding of jurisdiction in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-42 (1998).

28 U.S.C. § 2253(c)(2): "A certificate of appealability may issue under (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

IV. STATEMENT OF THE CASE

The Petitioner has lawful custody of Wills pursuant to his conviction by a jury of two counts of first degree murder in 1976.[2] Appendix D. Wills is serving a life sentence. *Id.* On direct appeal, Wills raised the issue of whether the evidence was sufficient to support his conviction. *Id.* Subsequently, Wills raised a claim of ineffective assistance of counsel in the state courts. *Id.* Wills raised those two issues in his first federal petition for a writ of habeas corpus in 1987. Appendices C and D. The federal district court denied that petition on the merits. *Id.* The Court of Appeals affirmed the denial of the first petition on the merits. *Id.*

In 1989, Wills filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking the same convictions. Appendix C. The federal district court denied Wills' petition, finding that Wills had abused the writ. *Id.*

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[2] The full facts of the case may be found at *Wills v. State*, 566 P.2d 1138, 1138-39 (Nev. 1977).

However, on appeal, the Court of Appeals concluded that issues contained in this second federal habeas corpus petition were unexhausted. *Id.* As a result, the Court of Appeals remanded the case to the district court with instructions to dismiss the petition without prejudice. *Id.*

In 1998, Wills filed his current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Appendix B. The district court ruled it lacked jurisdiction and denied a certificate of appealability. Appendices B and E. Wills sought a certificate of appealability on that issue, which the Court of Appeals granted. Appendices F and G. The Court of Appeals summarily reversed, contrary to the clear and explicit language of 28 U.S.C. § 2244(b)(3)(A). Appendix A. Petitioners now seek review of this ruling by the Court of Appeals.

V. SUMMARY OF THE ARGUMENT

When a prisoner in state custody has a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 *fully* adjudicated on the merits, *any* subsequent petition is a "second" or "successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). There has been much confusion about what

a "second" or "successive" petition is. Consideration of this case will allow this Court to consider that important question. Granting a writ of certiorari will also allow this Court to answer a question left unanswered two terms ago in *Stewart v. Martinez-Villareal*, 523 U.S. 627, 645 n. * (1998).

28 U.S.C. § 2253(c)(2) limits the jurisdiction of the Courts of Appeal to considering whether the petitioner has "made a substantial showing of the denial of a constitutional right." The Court of Appeals in this case granted a certificate of appealability on a question that was not constitutional at all. Therefore, the Court of Appeals lacked jurisdiction to act as it did.

VI. REASONS FOR GRANTING THE WRIT

1. A PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 IS A "SECOND OR SUCCESSIVE APPLICATION" PURSUANT TO 28 U.S.C. § 2244(b)(3)(A) REQUIRING THE APPLICANT TO MOVE IN THE APPROPRIATE COURT OF APPEALS FOR AN ORDERING AUTHORIZING THE DISTRICT COURT TO CONSIDER THE APPLICATION IN THE

CIRCUMSTANCE WHERE THE APPLICANT HAS ALREADY HAD A PRIOR PETITION PURSUANT TO 28 U.S.C. § 2254 FULLY ADJUDICATED ON THE MERITS.

Granting certiorari on this question would permit this Court to correct the error committed by the Court of Appeals. More importantly, this Court's intervention would allow for uniformity of law and clarification about what constitutes a "second" or "successive" petition for a writ of habeas corpus under federal law.

While unpublished, the Court of Appeals holding in this case is contrary to clear language of 28 U.S.C. § 2244(b)(3)(A), which states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." The Court of Appeals decision is also at variance with the Court of Appeals of another circuit, which held, under a virtually identical fact pattern, that the petitioner did need permission from the Court of Appeals to file a successive petition. *Graham v. Johnson*, 168 F.3d 762,

770-72 (5th Cir. 1999), *cert. pending*, June 21, 1999. The Fifth Circuit found that the date of the *first* federal habeas corpus petition dispositive to the legal requirement that a petitioner seek permission from the Court of Appeals before filing a "second or successive" federal habeas corpus petition. *Id.* at 786. *See In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999) (distinguishing between petitions dismissed for procedural grounds and those dismissed on the merits). *See also Vancleave v. Norris*, 150 F.3d 926, 928 (8th Cir. 1998) (petition "second or successive" because it was subject to "abuse of the writ" under former federal habeas corpus law).[3]

Additionally, there has been much confusion in the circuit courts about what exactly a "second or successive" petition *is* after this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). As this Court is well aware, *Stewart* involved this Court's determination that a prior dismissal of a claim because the claim was not "ripe" did not require a petitioner to seek permission from the Court of

[3] Arguably, the panel in this case also ignored its own circuit precedent in reaching its erroneous conclusion. *See Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997) (denying permission to file a successive petition after first petition denied on the merits and subsequent petition dismissed as unexhausted).

Appeals before filing a federal habeas corpus petition on the now "ripe" claim. *Id.* at 644-45.

Indeed, because this Court held that an "unripe" claim is similar to an unexhausted claim, this petition for certiorari will allow this Court to consider a question similar to the question it expressly chose not to answer in *Stewart*:

> This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a federal petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a "second or successive habeas corpus application" within the meaning of AEDPA.

Id. at 645, n. *. The federal courts fully adjudicated Wills' first federal habeas corpus petition in 1991. When Wills filed what is clearly his second petition in 1989, long before the adoption of the AEDPA, the Court of Appeals chose to dismiss it without prejudice pursuant to *Rose v. Lundy*, 455 U.S. 509 (1984)[4]. Thus, the unanswered question in the *Stewart* footnote, what issues can be raised after a prior full

[4] The Court of Appeals was clearly wrong when it stated in its most recent opinion that it had previously determined that Wills' second petition was not successive. *Compare* Appendices A and C.

adjudication on the merits, can be answered under the facts of this particular case.

In effect, the ruling from the Court of Appeals rewards a prisoner such as Wills who files an unexhausted petition over those who "follow the rules." Had Wills exhausted the issues contained in his second federal habeas corpus petition in the state courts and that had delayed his journey into federal court until after the passage of the AEDPA, there is no doubt that he would be required to seek permission to file a successive petition under the provisions of 28 U.S.C. § 2244(b)(3). Instead, by going to the federal courts *first*, the Court of Appeals has rewarded Wills while a similarly situated petitioner who had exhausted his claims in state court *first* would be required to secure permission to file a successive petition.

Because this case presents a compelling opportunity to define an important issue of federal habeas corpus law—what constitutes a "second or successive" petition following a *full* adjudication of all claims in a prior petition—certiorari should be granted.

2. THE COURT OF APPEALS IMPROPERLY GRANTED A CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253(c).[5]

This Court's statutory certiorari review power is limited to "cases" that were "in" the Court of Appeals. 28 U.S.C. § 1254(1). In order for a case to have been "in" the Court of Appeals, the Court of Appeals must have had jurisdiction over the case. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Before a federal habeas corpus petitioner can pursue an appeal from a district court's denial of relief in a § 2254 case, the petitioner must first obtain permission. 28 U.S.C. § 2253(c). This statute places a significant limitation on the jurisdiction of the Court of Appeals: "A certificate of appealability may issue under [28 U.S.C. § 2253(c)](1) only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added).

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[5] Petitioners acknowledge that much of this argument came from the brief of *amicus curiae* State of California in *Slack v. McDaniel*, No. 98-6322.

Whether a second federal habeas corpus petition is "second or successive" is not a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law does not infringe on the Constitution). Because Wills' appeal did not involve a constitutional issue, let alone one of a "substantial" nature, the Court of Appeals could not have issued a certificate of appealability. Therefore, the Court of Appeals lacked jurisdiction over the appeal. As a result, the second or successive application question was never "in" that court. Consequently, the Court of Appeals erred in granting the certificate of appealability and ruling on Wills' appeal.

Most Circuit Courts of Appeal, including the Ninth Circuit, have held that without a certificate of appealability, they lack jurisdiction to consider an appeal from the denial of a federal habeas corpus petition. *Marmalejo v. United States*, 1999 U.S. Lexis App. 21636, *2 (2nd Cir. Sept. 10, 1999); *Morris v. Horn*, 187 F.3d 333, 339 (3rd Cir. 1999); *Trevino v. Johnson*, 168 F.3d 173, 177 (5th Cir. 1999), *cert. denied*, 144 L.Ed.2d 825 (1999); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999). This Court has done the same, at least

by implication. *See Hohn v. United States*, 524 U.S. 236, 238-39 (1998) (implying that the Court of Appeals was correct in finding 28 U.S.C. § 2253 to be jurisdictional).

At least three circuits have also held that an erroneously granted certificate of appealability nonetheless grants jurisdiction to the Court of Appeals. *Soto v. United States*, 185 F.3d 48, 52 (2nd Cir. 1999); *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998), *cert. denied*, 143 L.Ed.2d 81 (1999); *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), *cert. denied*, 524 U.S. 928 (1998). Additionally, the Eighth Circuit, sitting *en banc*, concluded that "antecedent questions" to the merits of a habeas corpus claim may be considered. *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (*en banc*).

Petitioners acknowledge that they did not challenge the application for the certificate of appealability in the Court of Appeals. *See* Appendix H. However, it is axiomatic to elementary civil procedure that subject matter jurisdiction may not be waived and a party may challenge subject matter jurisdiction at any time. *See* Fed. R. Civ. P. 12(h)(3); Fed. R. Civ. P. 60(b)(4). *But see Gattlin v. Madding*, 1999 U.S. Lexis

App. 20067, *1 (9th Cir. July 12, 1999) (objection to certificate of appealability must be made within 35 days of application for certificate of appealability).

Petitioners also acknowledge that they are the Respondents in *Slack v. McDaniel*, No. 98-6322, and that this Court has ordered supplemental briefing and reargument in that case on the following two questions: "(1) Do the provisions of AEDPA, specifically including 28 U.S.C. § 2253(c) and 28 U.S.C. § 2244(b), control the proceedings on appeal? (2) If AEDPA does control the proceedings on appeal, may a certificate of Appealability issue under 28 U.S.C. § 2253(c)?" Resolution of the second question may have a direct impact on this case as well.

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This Court has held that "Congress has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). Congress' enactment should be given full force in limiting the jurisdiction of the Court of Appeals. This case, along with *Slack v. McDaniel*, will allow full consideration of the limitations on jurisdiction Congress enacted when it substantially amended 28 U.S.C. § 2253 and enacted 28 U.S.C. § 2253(c). Certiorari should be granted on that basis.

DATED: November 10, 1999.

Respectfully submitted,

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